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In the Supreme Court of the United States

OCTOBER TERM, 1975

ACCU-NAMICS, INC., PETITIONER

v.

W. J. USERY, JR., SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner contends that (1) the finding of the Occupational Safety and Health Review Commission that it committed a serious violation of the Occupational Safety and Health Act of 1970 (84 Stat. 1590, 29 U.S.C. 651 *et seq.*) is not supported by substantial evidence and (2) the court of appeals erred in

not excluding evidence of a safety violation allegedly gathered in violation of certain procedural requirements of the Act.

1. In January 1972, petitioner, an underground construction contractor, was digging trenches and laying pipe in connection with the installation of a municipal sewer line in Lubbock, Texas (Pet. App. A-4 to A-5, A-35, A-52). On January 18, four of petitioner's employees who were working at the bottom of a long, narrow trench 24 feet deep were killed when part of the trench wall collapsed (Pet. App. A-11, A-35, A-52; Tr. 30, 106).[1]

The trench had been dug next to a public street and within four feet of previously disturbed or "backfilled" soil covering a high-pressure gas line (Pet. App. A-8 to A-9, A-36, A-52; Tr. 30, 35, 152). The surrounding soil was a soft mixture of sand and clay and, at the depth of 12 to 19 feet, it consisted of fine, visibly crumbly sand deposits with high moisture content and very little cohesion (A-13 to A-15, A-36, A-53, A-57; Tr. 174, 218, 394-396). Moreover, the trench walls were neither shored nor sloped to prevent collapse; employees working in the trench were protected against collapse only by a shield that extended from the surface to the 14-foot level, leaving the bottom ten feet of the trench unguarded.[2]

[1] "Tr." references are to the transcript of proceedings before the Commission's administrative law judge.

[2] The shield, which had been designed and fabricated by petitioner, was suspended from a steel frame supported by wheels so that it could be rolled along the trench as work progressed. Its five-ton weight was concentrated by these wheels on the soil directly adjacent to the trench (Pet. App. A-6 to A-7, A-11 to A-12, A-14; Tr. 45, 49-50, 128-129, 302-303).

Petitioner had knowledge that two of its employees were working outside the shielded area (Pet. App. A-6 to A-7, A-10 to A-11, A-35 to A-36, A-52, A-57; Tr. 30, 104, 111, 139-140).

Shortly after the fatal accident, a Department of Labor compliance officer conducting a nearby inspection heard of the cave-in and proceeded to the scene. Due to the confusion generated by the presence of a large crowd that had gathered and by rescue efforts, the compliance officer was unable immediately to locate any responsible company officials. Finally, after about an hour, he found and identified himself to petitioner's job superintendent. The following day he revisited the accident scene to complete his investigation but found no employees or company officials present. On January 20, the compliance officer again returned to the jobsite, met petitioner's president and superintendent, and discussed the inspection with them (Pet. App. A-18, A-36, A-52; Tr. 236-238).

Petitioner was cited for a serious violation of Section 5(a)(2) of the Act, 29 U.S.C. 654(a)(2), for failing adequately to protect employees working in a trench dug in soft or unstable soil (Pet. App. A-2).[3]

[3] Section 5(a)(2) requires that each employer affecting interstate commerce "shall comply with occupational safety and health standards promulgated under this Act." 29 C.F.R. 1926.652(b) and (e), the pertinent safety standards, provide that sides of trenches five feet or more deep in unstable or soft material "shall be shored, * * * sloped, or otherwise supported

Following an evidentiary hearing, the Commission's administrative law judge found that the trench soil was fine sand that had very little cohesion and was friable (crumbly) under finger tips; that its high moisture content resulted in low shear strength; and that this instability was increased by adjacent gas-line backfill and the concentrated weight of the trench shield (Pet. App. A-14 to A-15). However, he vacated the citation on the procedural ground that the inspector had failed to comply with statutory provisions requiring presentation of credentials and consultation with employers (Pet. App. A-24 to A-32).[4]

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by means of sufficient strength to protect the employees working within them" and that "[a]dditional * * * shoring and bracing shall be [used] to prevent slides or cave-ins * * * in locations adjacent to backfilled excavations." 29 C.F.R. 1926.-652(k) and 1926.653(p) permit use of trench shields in lieu of shoring or sloping if they provide equivalent protection and define a "trench shield" as a construction "which support[s] the walls of a trench from the ground level to the trench bottom."

Section 17(k) of the Act, 29 U.S.C. 666(j), defines a serious violation as one that creates "a substantial probability that death or serious physical harm could result * * * unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."

[4] Section 8(a) and (e) of the Act, 29 U.S.C. 657(a) and (e), provide:

> (a) In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; * * *
>
> * * * * *
>
> (e) Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) of this section for the purpose of aiding such inspection.

Because of this disposition, the administrative law judge expressed no conclusion on the merits of the alleged violation (Pet. App. A-33).

The Commission reversed, holding that the compliance officer had substantially satisfied the provisions of Section 8 of the Act and that, even if a technical violation had occurred, it was harmless in the circumstances of this case. The Commission noted that the worksite was accessible to the public and completely open to public view, that the compliance officer had identified himself to petitioner's superintendent at the earliest practical opportunity, and that there had been no showing of prejudice from petitioner's failure to accompany the officer during his inspection (Pet. App. A-41 to A-45). Proceeding to the merits, the Commission substantially adopted the administrative law judge's findings of fact after review of the voluminous record and concluded that the trench soil was soft and unstable, that the trench shield did not conform to safety standards, and that a serious violation was established (Pet. App. A-34 to A-36, A-45 to A-46). The Commission assessed a $500 civil penalty against petitioner (Pet. App. A-46).

The court of appeals unanimously affirmed (Pet. App. A-49 to A-57; 515 F.2d 828). Concluding that the Commission's findings were supported by substantial evidence, the court deemed it unnecessary to decide whether the inspection had been in technical compliance with the Act because petitioner neither alleged nor suggested any prejudice from the asserted irregularities. The court of appeals reasoned that the Act's remedial nature precluded "any sweeping exclusionary rule" that would operate to the detriment of endangered workers (Pet. App. A-55). Finally, the court held that the Commission had acted within its discretion in deciding the case on the record without remanding to the administrative law judge (Pet. App. A-56 to A-57).

2. Petitioner's principal contention is that the court of appeals erred in concluding that the Commission's finding of a violation was supported by substantial evidence. This factual claim, which is amply rebutted by the record (Pet. App. A-14), does not warrant further review by this Court. Nor is there merit to petitioner's related assertion (Pet. 9) that the Commission and court improperly concluded that "because there was a cave-in there were violations of safety standards." The Commission specifically found that "the soil was of a soft, unstable nature"; that the trench shield "did not conform to the safety standards" since it "only extended 14 feet down into a trench that was 24 feet deep"; and that "there was no shoring, bracing, sloping, or hydraulic jacks" at the site (Pet. App. A-43, A-45 to A-46). Similarly, the court of appeals held that substantial evidence

supported the Commission's finding that "the soil was unstable and that the trench shield alone afforded inadequate protection" (Pet. App. A-57).[5]

3. Petitioner further contends (Pet. 10-11) that the court of appeals erroneously construed Section 8(a) and (e) of the Act to be permissive rather than mandatory. The court, however, expressly declined to construe the Act. It merely ruled that even if certain procedural provisions had been violated, vacation of the citation was not justified "when there is no showing that the employer was prejudiced in any way" (Pet. App. A-55).[6] This result fully accords

[5] Petitioner also challenges (Pet. 7-8) the Commission's power to make "initial" findings or to dispose of this case absent a remand to the administrative law judge. However, the Act charges the Commission with responsibility for fact finding. See Sections 10(c), 11(a) and (b), 12(i), 29 U.S.C. 659 (c), 660(a) and (b), 661(i); 5 U.S.C. 557(b). Moreover, despite petitioner's claim (Pet. 8) that the Commission ignored the law judge's findings, the Commission explicitly *adopted* the basic findings of the judge and simply drew therefrom the ultimate conclusion that the facts established a violation (Pet. App. A-45, A-54). In any event, the Commission was free to disregard the judge's findings so long as its own were supported by substantial evidence. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 488-490.

[6] The court of appeals stated (Pet. App. A-55):

> There has been no violation of the employer's fourth amendment right here; the jobsite was on a public street. There is no showing that the inspector looked where he had no right to look, nor that he filched information to which he was not entitled, had he shown his credentials. There is no showing that, had employer and employee representatives accompanied him, any further material or mitigating facts might have emerged. Accu-Namics had the opportunity before the hearing examiner to pre-

with settled principles that remedial legislation should be construed to effect its purposes (here the protection of employees' health and safety), and that a technical procedural error should not invalidate official action in the absence of a showing of prejudice. See *Peyton* v. *Rowe*, 391 U.S. 54, 65; *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 528-530; *National Roofing Contractors Ass'n* v. *Brennan*, 495 F.2d 1294, 1296 (C.A. 7), certiorari denied, 419 U.S. 1105; *Chicago* v. *Federal Power Commission*, 458 F.2d 731, 745-748 (C.A.D.C.), certiorari denied, 405 U.S. 1074.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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sent any such evidence and to cross-examine the inspector. At oral argument, counsel failed to indicate any specific way in which Accu-Namics was prejudiced. Therefore, because Accu-Namics has shown no harm resulting from the Secretary's alleged violations of the Act, we decline to adopt any sweeping exclusionary rule that would exclude the facts regarding the violation.

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